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No. 80-2050

In the Supreme Court of the United States

OCTOBER TERM, 1980

SARAH T. VAN CLEVE, ET VIR, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government's affidavits were sufficient to support summary judgment under Fed. R. Civ. P. 56.

2. Whether the National Park Foundation's failure to advise petitioners of the opportunity to negotiate an agreement with it pursuant to 16 U.S.C. 459i-3(a), violated the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-iii) is reported at 642 F.2d 788. The orders of the district court of November 10, 1978 (Pet. App. iv-ix), and of November 29, 1978 (Pet. App. x), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 1981. The petition for a writ of certiorari was filed on May 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 4 of the Act of Oct. 23, 1972, Pub. L. No. 92-536, 86 Stat. 1066, 16 U.S.C. 459i-3, provides in pertinent part:

> (a) With the exception of any property deemed necessary by the Secretary for visitor facilities or administration of the seashore, any owner or owners of improved property on the date of its acquisition by the Secretary may, as a condition of such acquisition, retain for themselves and their successors or assigns a right of use and occupancy of the property for noncommercial residential purposes, for twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later. The owner shall elect the term to be reserved. The Secretary shall pay to the owner the fair market value of the property on the date of such acquisition less the fair market value on such date of the right retained by the owner: * * * *Provided further*, That when acquiring lands, waters, and interests therein from the National Park Foundation, its successors and assigns, the Secretary shall acquire such lands, waters, and interests subject to the written terms and conditions contained in those transactions, including but not limited to options, entered into by the National Park Foundation prior to January 1, 1973, and that such previous written rights and interests shall prevail over provisions of this subsection.
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> * * * * *
>
> (c) The term "improved property," as used in this section shall mean a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 (hereinafter referred to as "dwelling"), together with

so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for the enjoyment of the dwelling * * *.

STATEMENT

This case arises from a civil action brought by the United States to condemn for public use as part of the Cumberland Island National Seashore petitioners' property located on Cumberland Island in Camden County, Georgia.[1] Petitioners do not challenge the amount received as just compensation, but rather the government's right to take their property at all.

In creating the Seashore, Congress provided that landowners could retain rights of use and occupancy in the tracts acquired for public use either (1) if the property had been "improved" by "a detached, noncommercial residential dwelling, the construction of which was begun before February 1, 1970 * * *" (16 U.S.C. 459i-3(c));[2] or (2) if such provisions were included in the written terms of transactions "entered into by the National Park Foundation prior to January 1, 1973 * * *." 16 U.S.C. 459i-3(a).[3]

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[1] The Act of Oct. 23, 1972, Pub. L. No. 92-536, 86 Stat. 1066, 16 U.S.C. 459i *et seq.*, established the Cumberland Island National Seashore and authorized acquisition of lands within its boundaries by the Secretary of the Interior.

[2] The rights that could be retained by owners of "improved property" were limited to a term of twenty-five years, "or, in lieu thereof, for a term ending at the death of the owner or his spouse, whichever is later." 16 U.S.C. 459i-3(a).

[3] The National Park Foundation was established in 1967 as the successor to the National Park Trust Fund. Pub. L. No. 90-209, 81 Stat. 656, 16 U.S.C. 19e *et seq.* Its purpose is

Invoking these provisions, petitioners contested the condemnation of their property. They conceded that they failed to qualify under the first provision because they had not begun construction of their residence prior to February 1970 (see Pet. 6). However, they alleged that they should have been permitted to retain the use of their property under the second provision because they had made an offer to donate the property to the Foundation and the Foundation had rejected that offer in an arbitrary and discriminatory fashion violative of the Fifth Amendment (Pet. 9-10).

The United States moved for summary judgment on this issue and supported its motion with affidavits (Pet. App. xxi-xxiv) stating that a search of the files revealed that the Foundation had no record of any such offer from petitioners, oral or written. Petitioners came forward with no evidence, by affidavit or otherwise, that a timely offer was made.[4] Accordingly, the district court held (Pet. App. x) that petitioners had failed to set forth any facts showing the existence of a genuine issue for trial

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to encourage private gifts of real and personal property * * * for the benefit of, or in connection with, the National Park Service, its activities, or its services, and thereby to further the conservation of natural, scenic, historic * * * or recreational resources for future generations of Americans * * *.

16 U.S.C. 19e. Lands acquired by the Foundation on Cumberland Island were to be "donated to the United States subject to the rights reserved by the previous owners * * *." H.R. Rep. No. 92-1405, 92d Cong., 2d Sess. 7 (1972); see 16 U.S.C. 459i-3(a).

[4] Petitioners were represented by counsel throughout the district court proceedings that culminated in summary judgment.

and granted partial summary judgment in favor of the government pursuant to Fed. R. Civ. P. 56(e). A trial was then held on the issue of just compensation, and a final judgment entered.

The court of appeals affirmed (Pet. App. i-iii). It held that, on the record before it, the district court correctly granted the motion for summary judgment. In addition, the court of appeals rejected petitioners' contention, raised for the first time on appeal, that the Foundation had a constitutional duty to notify small landowners of the option to enter into an agreement with the Foundation for the retention of a life estate. Apart from the fact that this issue had not been raised below, the court explained that petitioners could not have been injured by the alleged breach of duty because they were, in fact, aware of this option.

ARGUMENT

1. Petitioner contends (Pet. 13-28) that the district court erred in granting summary judgment based on the record before it. This contention is without merit.

It is settled that when a motion for summary judgment is made and supported as required by Fed. R. Civ. P. 56, the opposing party must come forward with specific facts showing a genuine issue for trial. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 159-161 & nn. 19, 20 (1970); *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288-290 (1968). As both courts below correctly concluded (Pet. App. ii-iii, x), petitioners failed to do so.

The government submitted affidavits negating the existence of any record at the Foundation of any offer from petitioners, written or oral. Despite their unique access to the specific facts surrounding the

making and rejection of their alleged offer, petitioners, who were then represented by counsel, did not take the simple step of producing the sworn statement of whichever of them had made, or had personal knowledge of, the offer.[5] By its terms, Rule 56(e) required the result reached here.

Petitioners' primary contention here, not previously raised, goes to the form of the government's affidavits, rather than their substance. They contend that the affidavits submitted by the government were insufficient because they were not made on the personal knowledge of the affiant and hence did not satisfy the formal requirements of Fed. R. Civ. P. 56(e).[6] Ordinarily, such an objection to the form of an affidavit is waived if no motion is made to strike the affidavit (see 6 *Moore's Federal Practice* ¶ 56.22[1], at 1330 (2d ed. 1980); C. Wright & A. Miller, *Federal Practice and Procedure* § 2738, at 706 (1973)), and this contention certainly is not properly before this Court.[7] In any event, it is without foundation.

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[5] Petitioners relied primarily on mere repetition of the general, unverified allegations in their answer. As the court of appeals held (Pet. App. ii), this was plainly insufficient under Rule 56(e). See, *e.g.*, *Adickes* v. *Kress & Co.*, *supra*, 398 U.S. at 159 n.20. Also insufficient was a relative's affidavit concededly submitted as evidence of petitioners' "intent" to deal with the Foundation, " 'not as evidence of *the* offer.' " See Pet. App. ii-iii (emphasis in original).

[6] Rule 56(e) requires that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

[7] This Court ordinarily will not consider issues not raised in the courts below, especially where, as here, a timely objec-

Both of the affidavits in question (Pet. App. xxi, xxiii) tracked the requirements of Fed. R. Civ. P. 44(b) and Fed. R. Evid. 803(10) for proving the absence of a public record or entry, *i.e.*, that no such record had been found "after diligent search." The failure of the affiant personally to perform the search does not, as petitioners urge (Pet. 18), mean he lacks "personal knowledge" within the meaning of Fed. R. Civ. P. 56(e). As one leading commentator has noted in connection with the general application of the personal knowledge requirement to testimony about records: "It is proper for [the affiant] to rely on a government colleague or subordinate; *the personal knowledge requirement will be fulfilled if the other government employee has the requisite knowledge.*" 4 *Weinstein's Evidence* ¶ 803(8)[02], at 196 (1979) (emphasis supplied). In addition, Fed. R. Evid. 803(6) equates a "person with knowledge" of the records with the custodian. See S. Rep. No. 93-1277, 93d Cong., 2d Sess. 17 (1974). As President of the Foundation and custodian of its records, the affiant here was plainly competent to testify that the Foundation lacked any record of an offer from petitioners.[8]

2. Petitioners also contend (Pet. 28-33) that the National Park Foundation was constitutionally required to "affirmatively contact" (Pet. 30) all landowners with respect to the possibility of negotiating

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tion below could have permitted the other party to remedy any defect. See *First National Bank* v. *Cities Service Co.*, *supra*, 391 U.S. at 280-281 nn. 16, 17.

[8] The cases cited by petitioners (Pet. 17-18) as in conflict with this case are inapposite. This is not a case where the affidavit reflects the affiant's opinion or is based "on information and belief."

with the Foundation for reservation of use and occupancy of their properties.[9] As the court of appeals noted (Pet. App. iii), this issue was not raised or argued in the district court. It is therefore not properly presented to this Court. See note 7, *supra*.

In any event, the court of appeals correctly rejected this contention (Pet. App. iii). Because petitioners have always asserted their actual awareness of the option of dealing with the Foundation, they cannot have been harmed by the alleged breach of duty.[10] Moreover, nothing in the language or legislative history of the Act creating the Foundation and the Seashore suggests that Congress intended to impose on the Foundation the duty to "affirmatively contact" every landowner within the boundaries of the Seashore, nor does the Constitution impose any such duty.

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[9] Petitioners' suggestions (Pet. 7, 8, 30) that the Foundation put special effort into reaching agreements for the acquisition of the Carnegie estate warrant no negative inference. The Carnegie holdings once amounted to almost 90% of Cumberland Island's acreage. See *First National Bank* v. *United States*, 350 F.2d 606, 607 (5th Cir. 1965).

[10] Petitioners' suggestion (Pet. 32) that they were harmed because they were not given "precise instructions" as to how to make an offer acceptable to the Foundation is effectively a reiteration of their first contention that they made an offer that was arbitrarily refused, and it is without merit for the reasons stated above.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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